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DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTORPOLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTONOLYMPIANS FOR PUBLIC  
ACCOUNTABILITY;

No.

Petitioner,

NOTICE OF APPEAL

v.

DEPARTMENT OF ECOLOGY; PORT  
OF OLYMPIA

Respondents,

I. Identity of appealing parties and representative.

The appealing party is

Olympians for Public Accountability  
120 State Ave. NE, PBM #232  
Olympia, WA 98501  
(360) 570-9903

The representatives of the appealing party are

Richard A. Smith  
Brian Knusten  
Smith & Lowney, PLLC  
2317 East John Street  
Seattle, WA 98112  
(206) 860-2883  
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NOTICE OF APPEAL - 1

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1           2.     Identification of other parties.

2           The respondents in this appeal are the Washington State Department of Ecology and the  
3 Port of Olympia.  
4

5           3.     The decision under appeal.

6           This is an appeal of the "Industrial Stormwater General Permit," a National Pollutant  
7 Discharge Elimination System and State Waste Discharge General Permit, issued on October 21,  
8 2009. A copy of this permit is attached. This is also an appeal of the coverage under this Permit  
9 of the Port of Olympia for discharges from its Ocean Terminal, located at or about 915  
10 Washington St. NE, Olympia, WA.  
11

12           4.     Short and plain statement showing grounds for appeal.

13           Appellant considers the Industrial Stormwater General Permit and the Port of Olympia's  
14 coverage under it to be unlawful and unfair because they do not meet the requirements or intent  
15 of the federal Clean Water Act, applicable regulations promulgated by the Environmental  
16 Protection Agency, Washington State water pollution control law, and Ecology's regulations. In  
17 violation of these various laws and regulations, the Industrial Stormwater General Permit fails to  
18 ensure compliance with water quality standards or establish numeric effluent limitations. The  
19 Permit also fails to require implementation of AKART and includes unclear, unlawful,  
20 inconsistent, and unfair monitoring, application, and reporting requirements, that in some cases  
21 fail to satisfy applicable regulatory requirements. The Permit also includes unlawful and unfair  
22 provisions for effective modification of permit terms without adherence to permit modification  
23 procedures.  
24  
25  
26  
27

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1 5. Statement of facts.

2 Covered for stormwater discharges to Budd Inlet from its Ocean Terminal facility, the  
3 Port of Olympia is one of approximately 1,000 permittees under the Industrial Stormwater  
4 General Permit.  
5

6 Budd Inlet is on the current 303(d) list as water quality impaired for dissolved oxygen in  
7 the water column and for benzo[b]fluorine, benzo[k]fluourine, benzo[a]anthracene, chrysene,  
8 and PCB in fish tissue. The Permit is unlawful and coverage for the Port of Olympia is  
9 inappropriate because the Permit fails to include numeric or other water quality-based effluent  
10 limitations or monitoring requirements for any of these parameters. Among other reasons, this  
11 failure is unlawful because RCW 90.48.555(7) requires that the Permit include numeric water  
12 quality-based effluent limitations for discharges to 303(d)-listed waterbodies and provides for no  
13 exceptions.  
14

15  
16 The Port of Olympia as been covered under previous versions of the Industrial  
17 Stormwater General Permit. In or about 2006, as the Port had determined to commence some  
18 limited log handling or export business and upon the Port's request, Ecology modified the Port's  
19 coverage under the permit to include discharges from timber handling activities. This imposed  
20 the sector-specific requirement that the Port monitor BOD5 concentrations of its discharge and a  
21 benchmark of 30 mg/L for BOD, exceedences of which triggered adaptive management  
22 requirements (Levels 1, 2, and 3, etc.).  
23

24  
25 In or about 2008, the Port was concluding negotiations with Weyerhaeuser Company  
26 ("Weyco") for leasing a significant area of its Ocean Terminal for Weyco log export operations,  
27 to replace Weyco operations at the Port of Tacoma. A challenge for this agreement was  
28

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1 presented by the Industrial Stormwater General Permit – if Weyco needed to obtain NPDES  
2 permit coverage as a new facility and new discharger of stormwater from a log handling facility,  
3 which has significant potential to be high in BOD and low in dissolved oxygen, to Budd Inlet it  
4 was unclear whether the new Weyco facility could be covered under a general permit and  
5 whether and what treatment would be required because of Budd Inlet's 303(d)-listing for  
6 dissolved oxygen and the AKART requirement. Obtaining an individual permit and/or installing  
7 treatment for stormwater discharges could be costly and Weyco desired to avoid these costs and  
8 related uncertainties and to move forward to commencing operations at the Port of Olympia  
9 without delay.  
10  
11

12 Weyco and/or the Port of Olympia came up with a way to avoid these difficulties. Since  
13 the Port had previously modified its Industrial Stormwater General Permit coverage to allow  
14 timber products industry discharges, Weyco operations could simply come under the umbrella of  
15 the Port's existing coverage without need for any new permit and without triggering any new  
16 requirement for evaluation of AKART or the need for treatment or effluent limitations to ensure  
17 that discharges do not cause or contribute to violation of water quality standards, as evidenced by  
18 Budd Inlet's dissolved oxygen 303(d)-listing or otherwise. Ecology agreed with this course of  
19 action and evaluation of AKART and potential for violation of water quality standards was  
20 sidestepped as the new Weyco facility became covered under the Port's Industrial Stormwater  
21 General Permit coverage.  
22  
23  
24

25 The issuance of this new Industrial Stormwater General Permit provides the first  
26 opportunity for challenge to the Board of the Port's coverage as it includes the Weyco facility.  
27 The coverage of the Weyco facility and its discharge under this Permit represents an unlawful  
28

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1 evasion of applicable legal requirements, including those requiring determination of AKART and  
2 prohibiting issuance of NPDES permits that fail to ensure that new discharges do not cause or  
3 contribute to violations of water quality standards.

4 In the new Permit, the requirement for BOD monitoring and the 30 mg/L BOD  
5 benchmark have been removed and replaced with COD and total suspended solids monitoring  
6 requirements and benchmarks of 120 mg/L and 100 mg/L respectively. On information and  
7 belief, Petitioner asserts that these changes were made at Weyco's specific request in an effort to  
8 continue to avoid requirements that it implement treatment or otherwise ensure that discharges  
9 from its Port of Olympia facility receive AKART and do not cause or contribute to violations of  
10 water quality standards. In any event, this change in monitoring requirements and benchmarks is  
11 in violation of applicable law.

12 Monitoring requirements of the Permit fail to ensure that monitoring for permit  
13 compliance and other purposes, including triggering adaptive management responses, satisfies  
14 the requirements of applicable law, including those mandating that monitoring be representative  
15 of the discharge monitored. These include but are not limited to monitoring provisions regarding  
16 sampling requirements, especially the timing for sample collection, selection of discharges and  
17 pollutant parameters for sampling and analysis, inspections, and relief from monitoring  
18 requirements for "consistent attainment."

19 In developing the Permit, Ecology violated applicable law by failing to perform  
20 reasonable potential analysis and to make other determinations that are required. As a result, the  
21 Permit fails to include numeric water quality-based effluent limitations as required by applicable  
22 law.

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28  
29

The adaptive management requirements of the Permit ("Corrective Actions") are inconsistent with applicable law. Among other deficiencies, relevant permit conditions regarding triggering timelines for corrective actions make it extremely unlikely that any given permittee will actually reach Level 3, the stage at which treatment BMPs are finally required. This is a failure to require AKART and otherwise inconsistent with applicable law. In addition, the requirements of a Level 3 response do not ensure that AKART is implemented even if Level 3 is reached. The Corrective Action conditions also allow Ecology to waive permit requirements to implement improved water quality controls even where discharges may cause or contribute to a violation of water quality standards.

7. Relief requested.

Appellant requests that the Board order the Department of Ecology to modify the Industrial Stormwater General Permit to be consistent with applicable legal requirements in response to the above-listed defects and, furthermore, that the Board order that discharges from the Port of Olympia may not be authorized under the Industrial Stormwater General Permit.

Dated this 17 day of November, 2009.

SMITH & LOWNEY, PLLC

By: 

Richard A. Smith, WSBA #21788

Brian Knutsen, WSBA #38806

Attorneys for Petitioner

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## CERTIFICATE OF SERVICE

I, Lonnie Lopez, declare that I had this Notice Of Appeal served by Overnight Mail on the Department of Ecology, 300 Desmond Drive, Lacey, WA 98503, and on the Port of Olympia, 915 Washington St. NE, Olympia, WA 98501-6931, on November 17, 2009.

Lonnie Lopez  
Lonnie Lopez

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